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No. 92-2037

In The

# Supreme Court of the United States

October Term, 1993

RICHARD A. WOLFF AND MARGUERITE M. WOLFF,

*Petitioners,*

vs.

LIFE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation and JOHNSON & HIGGINS, a Foreign Corporation,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF RESPONDENT LIFE INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sections 1001 *et seq.*, by not following a prior decision which interpreted a Michigan state statute, which concerned a different set of facts, and which was not cited by any party below.

2. Whether the Sixth Circuit violated the intent of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sections 1001 *et seq.*, by rejecting arguments that were waived, that disregarded undisputed plan language, or that petitioners themselves conceded did not apply in this case.

## RULE 29.1 STATEMENT

Life Insurance Company of North America is a wholly owned subsidiary of CIGNA Corporation.

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## BRIEF OF RESPONDENT LIFE INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION

This unique case presents no issue of national importance, no conflict among the circuits, and represents no departure from the holdings of any court. Instead, the Sixth Circuit's unpublished decision concerns a minor issue of plan construction based upon a highly unusual fact pattern. The issues petitioners have identified concern an alleged conflict within the Sixth Circuit based upon a case no party cited below, arguments that were waived, or matters well within the court's discretion. Because a decision of such little consequence does not

merit Supreme Court review, respondent Life Insurance Company of North America ("LINA") respectfully requests that the Petition for Writ of Certiorari be denied.

## STATEMENT OF FACTS

### A. The Plan Terms

Petitioner Richard A. Wolff, an employee of Johnson & Higgins, was eligible to participate in various company sponsored benefit programs. LINA underwrote three of the programs by issuing separate insurance policies for personal accidents, business travel accidents, and long-term disability benefits. Although each of the policies set forth different terms, the two policies at issue required that written proofs of loss be furnished within ninety days of the date of loss and that any legal proceeding be commenced within three years of that date. Johnson & Higgins gave Wolff printed booklets which explained the policies' terms and requirements.

### B. Wolff's Injury

On March 18, 1980, Wolff suffered a head injury in a restaurant parking lot while on a business trip. Although he continued to work for several months, he retired six months later on account of a disability allegedly caused by the injury.

Upon his retirement, Wolff immediately began to pursue his right to benefits under a number of different policies or programs. He filed for and received benefits under the long-term disability policy underwritten by

LINA. He applied for workers' compensation benefits. When his workers' compensation benefits were denied, he hired an attorney to file suit against Johnson & Higgins and ultimately settled his claim. He also applied for and received social security disability benefits.

### C. Wolff's Claim for Benefits

Although Wolff filed claims to receive benefits under a myriad of programs, he filed no claims under the personal injury accident or travel accident policies for many years. In late 1988, Wolff read the booklets in his possession, came across the two policies, and submitted claims. Wolff's claims under both policies were promptly denied on the grounds that his disability was not due to accidental means but, rather, was a result of a preexisting injury. On June 1, 1990, over nine years after the injury allegedly giving rise to the claims, the Wolffs filed suit.

### D. The District Court's Order

LINA moved the court to dismiss the Wolffs' claims and for summary judgment based upon, among other things, the plan language requiring that proofs of loss be submitted within ninety days and that suit be filed within three years. The Magistrate Judge concluded, based upon the plan language, that the claims were untimely and recommended that summary judgment be granted in LINA's favor. In an unpublished decision, the district court adopted the Magistrate Judge's recommendation, and granted summary judgment on December 13, 1991.

### E. The Sixth Circuit's Order

The Sixth Circuit affirmed the district court's decision on March 23, 1993. In an unpublished *per curiam* decision, the court found no grounds which would relieve Wolff of his obligations under the plans to file claims within the required time period. Indeed, the court found that Wolff had, with the assistance of counsel, actively pursued claims under a variety of policies and state and federal programs. The court was also persuaded that Wolff had been in possession of the policies before his injury, and should have been aware of the plan terms during the relevant time period. It also refused to consider various arguments not raised before the district court, and declined to overturn the district court's decision not to permit leave to amend when no such motion had ever been filed.

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## REASONS FOR DENYING THE WRIT

## I. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW

10.1 of the Rules of the Supreme Court of the United States provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such special and important reasons exist in this case.

### A. This Case Is Not Of National Importance.

The Sixth Circuit's opinion is not of national importance. It concerns a narrow issue of plan construction

against the backdrop of Michigan law as applied to an unusual fact pattern. The case presents no issue troubling federal courts or, for that matter, courts in the State of Michigan or any other jurisdiction.

The decisions below were of so little consequence that the courts elected not to have them published. The Sixth Circuit, in fact, designated its decision "not for publication" pursuant to its own Local Rule 24, which limits the use of the opinion to "establishing res judicata, estoppel, or the law of the case." Sixth Cir. R. 24. No national interest would be served by reviewing an opinion of such limited application. As this Court stated in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954), "[s]pecial and important reasons imply a reach to a problem beyond the academic or episodic."

### B. The Decision In This Case Is Not In Conflict With The Decisions Of Any Other Court.

#### 1. There Is No Conflict Between Circuits.

The Sixth Circuit's decision does not constitute a departure from the holdings of any court. It does not, and is not alleged to, conflict with a holding of any other circuit. No other federal court of appeals has ever been presented with the issues raised in this case. No state court decision conflicts with this case.

#### 2. Wolff's Argument Is Waived.

Wolff argues that the decision below was in conflict with a prior Sixth Circuit decision, *Norfolk & Western Railway Co. v. Auto Club Ins. Ass'n*, 894 F.2d 838 (6th Cir.

1990) ("*ACIA*"). The *ACIA* decision was not cited in any of the briefs filed by any party before the Sixth Circuit, or in the Sixth Circuit's own unreported decision. It was not until the filing of the Petition for Writ of Certiorari that Wolff contended that the *ACIA* decision had any bearing on this case whatsoever. Wolff's argument, therefore, is waived and cannot form the basis of review. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19 (1986).

### 3. The Case Alleged To Be In Conflict Is Highly Distinguishable.

In fact, the decision in *ACIA* is readily distinguishable on several grounds. In that case, an automobile collided with a train owned by the Norfolk & Western Railway Co. on May 2, 1985, causing extensive damage. Within days the railroad submitted a claim to the driver's "no fault insurer," ACIA, but was unable to pinpoint the amount of loss immediately due to ongoing repairs. ACIA assigned a claim number, investigated the accident, determined the claim was payable, and established a substantial reserve in accordance with the railroad's damage estimates. In late 1986, however, it denied the claim because the precise damage estimates allegedly were not timely received.

The railroad filed suit against ACIA on April 3, 1987 under Michigan's No-Fault Insurance Law, Mich. Comp. Laws Ann. Sections 500.3101-.3179, a statute having no application to this dispute. In response, ACIA asserted that the claim was time-barred under the statute's one-year limitations period, Mich. Comp. Laws Ann. Section

500.3145(2). The district court granted judgment in the railroad's favor, and ACIA appealed.

After reviewing Michigan case authorities, the Sixth Circuit construed the Michigan No-Fault Statute as permitting tolling under limited circumstances. It also found that tolling would apply in that case because the railroad promptly indicated its intention to file a claim, gave the insurer detailed information, negotiated with the insurer, and exercised reasonable diligence in preserving its rights. Nothing in *ACIA* suggested that tolling would apply to a ERISA claimant, represented by counsel, who, contrary to plan language, filed no claim for nine years.

### 4. The Sixth Circuit's Decision In This Case Was Also In Harmony With State Law.

The Sixth Circuit's decision in this case was also in perfect harmony with that of Michigan state courts. In *Welton v. Carriers Ins. Co.*, 365 N.W.2d 170 (Mich. 1984), the Michigan Supreme Court found that the filing of a claim with a workers' compensation insurance carrier did not satisfy the notice requirement under a no-fault automobile insurance policy even when, as here, the same carrier underwrote both policies. In *Benson v. Home Ins. Co.*, 333 N.W.2d 43 (Mich. App. 1983), the Michigan Court of Appeals refused to create a duty by an insurer or employer to investigate potential claims on employees' behalf under different policies or plans. The Sixth Circuit's decision in this case was in accord with both its own and Michigan precedent, to the applicable extent.

### C. The Sixth Circuit's Refusal To Ignore Established Precedent Or To Review Waived Arguments Did Not Violate ERISA.

#### 1. This Argument Was Waived.

Wolff next argues that the Sixth Circuit's decision, by its "very tenor" (Petition at 21) violated ERISA because it did not sufficiently favor him, the plan participant. This issue is not ripe for review since Wolff did not argue this matter either before the Sixth Circuit or, with respect to the district court's decision, on appeal. That argument, like the first, is therefore waived.

#### 2. Wolff Cannot Identify Any Provision Of ERISA Violated By The Court.

Second, Wolff does not argue that the Sixth Circuit's decision violated any provision of ERISA. Rather, he relies upon unfocused policy statements regarding the intent of ERISA's drafters. As this Court stated only a few short weeks ago, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2071 (1993) (emphasis in original). Vague arguments regarding a statute's intent do not override its plain provisions.

#### 3. The Arguments In The Petition Conflict With The Arguments Raised Before The Sixth Circuit.

Wolff's own arguments below, in fact, actually vitiate the contentions he now attempts to raise on certiorari.

Wolff contends, for example, that the Sixth Circuit violated ERISA by "disregarding" the Michigan Supreme Court's decision in *Welton v. Carriers Ins. Co.*, 365 N.W.2d 170 (Mich. 1984). As set forth above, however, the Michigan Supreme Court in that case held that an employee's claim under the state workers' compensation statute did *not* give rise to a duty to investigate claims under other benefit plans. Moreover, Wolff himself argued before the Sixth Circuit not that *Welton* was controlling but, rather, that it should be distinguished from this case. (Brief at p. 4).

### 4. An Appellate Court's Refusal To Consider Waived Arguments Does Not Violate ERISA.

Wolff's arguments relating to the alleged lack of prejudice to LINA were not presented to the district court and were not first raised on appeal until nearly four months *after* his initial brief before the Sixth Circuit. The Sixth Circuit's refusal to consider these late-filed arguments was neither surprising nor in violation of ERISA.

The Sixth Circuit also did not violate ERISA by finding that the district court acted within its discretion by refusing leave to amend the Complaint. Since no motion to amend was ever filed, and since the proposed amendment would have been futile, it could not be said that the court abused its discretion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The Sixth Circuit's application of well established precedent and its refusal to review arguments which were waived violated neither the spirit nor the letter of ERISA's terms.

## II. THE SIXTH CIRCUIT CORRECTLY DECIDED THIS CASE.

Finally, the Sixth Circuit reached the correct decision below. ERISA requires adherence to plan terms. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989); 29 U.S.C. § 1104(a)(1)(D) (fiduciary duty exists to follow plan terms). The plan terms in this case unambiguously required the submission of proofs of loss within ninety days, and the filing of suit within three years after that.

The Sixth Circuit did not violate ERISA's policies by concluding that an individual who, while represented by counsel, "applied for retirement benefits, long-term disability benefits and social security benefits and applied and sued for workers' compensation benefits" (Appendix B, at 9a) could not as a factual matter claim the benefits of nine years of tolling. No basis existed under the facts or law to excuse a six-year delay in the presentation of Wolff's claim.

## CONCLUSION

This case does not merit Supreme Court review. The Sixth Circuit applied established precedent to a unique fact pattern and correctly concluded that the respondents were properly granted summary judgment in their favor. The case presents no conflict between or among the circuits, no conflict with the decisions of this or any other Court, and no issue of such importance as to warrant this Court's intervention.

For all of these reasons, the Wolffs' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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